No. 15,541

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF NEVADA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Albert Lee Stephens, Chief Judge, and to the Honorable Dal M. Lemmon and Frederick G. Hamley, Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The Bank of Nevada, the Appellant above named, presents this its petition for rehearing in the above entitled cause, and, in support thereof, respectfully shows:

I.

THE COURT ERRED IN ITS APPLICATION OF THE LAW RECITED IN THE CASE OF U.S. v. GRAHAM IN ITS OPINION AFFIRMING THE JUDGMENT OF THE DISTRICT COURT.

This Honorable Court regarded the case of *U. S. v. Graham* (D.C. Cal. 1951) 96 F.Supp. 318, as controlling in section 5 of its opinion and concluded that no set-off could exist in the present case.

It is the opinion of the Petitioner herein that th *Graham* case is clearly distinguishable on its fact from the case at bar in the following respects:

It is agreed that in both cases the obligation of th third party to the taxpayer arose after the federal ta liens had been established. That is, in the *Graha* case, the rental accrued from the State of Californi after the tax liens had been established, and in th *Bank of Nevada* case, if the "first-in, first-out" theor is applied, the deposits sought to be subjected to th federal tax liens were made after those liens had bee established. It is also true that the obligation fro the taxpayer to the third party, which the third par sought to set-off, in each case arose after the establis-ment of the federal tax liens. That is, in the *Graha* case the state taxes apparently became due after te federal tax liens had become effective, and in te *Bank of Nevada* case the loan was made to the ta-payer after the federal tax liens had come into bein.

However, here the similarity between the cas ceases, and in the *Graham* case the claim for sta taxes was totally unrelated to the rentals due und the leases. In the *Bank of Nevada* case, the debt of the bank due the taxpayer, represented by the depcit balance, can be said to have arisen from the loan y the bank. The deposit of the taxpayer to the extat of $2,000, was from its inception subject to the ban's right of set-off, a right arising from the very transc-tion which created the deposit and inseparable frm the bank's debt to the taxpayer.

In the *Graham* case, the state's claim for taxes as in no way identified with or attached to the sta's

ental obligation. It was an entirely separate transction.

But in the *Bank of Nevada* case the claim the bank ought to set-off against the debt to the taxpayer ame into being simultaneously with the debt to the axpayer, and the right of set-off was in fact provided or by agreement between the bank and the taxpayer efore the federal tax liens were established.

Such an agreement as was contained in the financial atement of August 14, 1954, between the Bank of evada and the taxpayer, is an integral part of such ormal daily banking transactions as are described in ie case at bar. This is, and has been, for an indeterminable period of time in the past, part of the ormal daily procedure in banking transactions of is nature, wherein daily, banks throughout the nited States make unsecured loans to their existing mmercial depositors to tide them over the tempory financial crises of present day business. All such nsecured loans are predicated upon an agreement th the depositor that any funds on deposit with the nk shall be security for such loans.

The present opinion seems to treat the rights of e bank as a lien which arose after the two tax ns and was, therefore, subordinate to the tax liens. the rights of the bank were a lien, the only posle lien was a pledge of money in Bentley's account, d Section 6323(c) of the Internal Revenue Act of 54 provides appellant with a complete statutory fense. This section reads:

"(c) Exception in case of securities.—

(1) Exception.—Even though notice of a lie provided in section 6321 has been filed in th manner prescribed in subsection (a) of this sec tion, the lien shall not be valid with respect to security, as defined in paragraph (2) of this sub section, as against any mortgagee, pledgee, o purchaser of such security, for an adequate an full consideration in money or money's worth, i at the time of such mortgage, pledge, or pu chase such mortgagee, pledgee, or purchaser without notice or knowledge of the existence c such lien.

(2) Definition of security.—As used in th subsection, the term 'security' means any bon debenture, note, or certificate or other evidenc of indebtedness, issued by any corporation (i- cluding one issued by a government or politicl subdivision thereof), with interest coupons or registered form, share of stock, voting trust ce- tificate, or any certificate of interest or parti- pation in, certificate of deposit or receipt fo temporary or interim certificate for, or warrat or right to subscribe to or purchase, any of te foregoing; negotiable instrument; or money."

It is to be noted that the definition of "securit" includes "money", and that tax liens, even recordd tax liens, "are not valid" with respect to a secur:y as against a bona fide pledgee who at the time of te pledge was without notice or knowledge of the exit- ence of the tax liens. No one can deny that the bak made the loan for full and adequate considerati, without notice or knowledge of either tax lien. Te money in Bentley's account was a security held y the bank for Bentley's debt to the bank. Therefce,

ne tax liens were not "valid" (to use the language f Section 6323(c)) against this security.

II.

IE COURT ERRED IN FINDING IN ITS OPINION THE ACTUAL SET-OFF OCCURRED SUBSEQUENT TO THE GOVERNMENT'S DEMAND AND LEVY, AND IN ITS APPLICATION OF THE CASE OF U.S. v. WINNETT IN SUPPORT THEREOF.

It is clear in the case of *U. S. v. Winnett,* 165 F. 2d 9, that a right of set-off can be created by an agreement and that such right is perfected at the time of e execution of the agreement continuing thereafter til the events occur, which are provided for in the reement, to automatically give effect to the right set-off. This is exactly what happened in the *innett* case, and under no interpretation of said case n it be said that the right of set-off was inchoate d required further acts upon the part of the person ving said right to apply the unappropriated money his debtor in his hands in extinguishment of the bts due to him.

The theory adopted by the Court, in its present inion, would mean that all set-offs are inchoate and rfected only after process is received, or in the tant case, after notice of levy had been received the bank. It is the Petitioner's opinion that such conclusion is contrary to the law of the *Winnett* e, and, in fact, that case holds that the instantaous decision to make the set-off should be the conlling factor. In fact any other conclusion is comtely unrealistic.

The facts of any case where set-off is applied, wi support the above conclusion, and that conclusio only, for when any official, sheriff or constable pr ceeds to serve a levy upon a debtor, that debtor canne have knowledge of the name of the person involve until the official, sheriff or constable, notifies him c the same, or until his name is disclosed by the servic of the levy or writ. Therefore, it is at that speci moment, at the time of service of levy upon the ban, that Mr. Bentley no longer had the right to use th money or the credit with the bank, and at that instat the set-off took place, and the only thing remainin to be done was for the officer or employee receivin the levy to notify the bookkeeping department t make the actual entry upon the ledger sheet mai- tained for the taxpayer. This is what actually o- curred in the present case, and what in reality occurs instantly not "after" in all cases of set-off.

Another factor ignored by the Court in its opinin is that actually the taxpayer in the instant case was using the bank's money, and not his own, for the bank had loaned the sum of $2,000 to Mr. Bentley, which he deposited in the account. The bank p- mitted Mr. Bentley to use its money conditioned upn and in consideration for the right of set-off and the right to terminate the use of said funds. As a co- sequence the rights of Bentley ceased immediat y upon the service of notice of levy, and the right of the bank to set-off any balance due against the lan arose immediately. One is the consideration for the other. It is inequitable to enforce one without enfoc-

g the other. To hold that such a right of set-off inchoate and can only occur after the notice of levy d demand by the Government would in effect create eater rights in the fund or the credit than the de- sitor had. This is the opinion of the Petitioner as the holding of the *Winnett* case and the cases cited that decision.

It is concluded, therefore, that the present opinion this Court fails to apply and ignores the well- tablished rule set forth in the *Winnett* case and sup- rted by the case of *No. Chicago Rolling Mills Co. v. regon & Steel Co.,* 152 U.S. 596, 14 Sup. Ct. 710, at a creditor or garnishor can have no greater rights an those of a person against whom the garnishment levy is sought to be enforced, or as in this case, e taxpayer or depositor whose right to the use of oney or bank credit is sought to be levied upon.

It is the conclusion of the Petitioner that the right set-off in the instant case was not inchoate in any spect and did not relate back to the date of the reement, as understood upon the doctrine of "rela- n back" as determined by the case of *U. S. v. Secu- y Trust and Savings Bank,* 1950, 340 U.S. 47, but her that such agreement is a continuing one which ited the condition upon which the bank will make secured loans and which relates to the basis upon ich the borrower pledges any credits to which he y be entitled from the bank as security for such n.

III.

THE COURT ERRED IN FAILING TO CONSIDER THE CASE OF U.S. v. BANK OF SHELBY.

In the case of *U. S. v. Bank of Shelby,* 68 F. 2d 53 (C.A. 5th), cited on page 7 of Appellant's Rep Brief the Appellate Court upheld the right of se off in a situation similar in all practical respec to the case at bar. In the *Shelby* case, the obligatio of the third party to the taxpayer, and the obligatio from the taxpayer to the third party, arose out of te same transaction wherein a promissory note was giv and the funds obtained therefrom deposited to te taxpayer's account. The Court at page 539 recognized the rule in equity which permits set-off of unmatured debts when the debtor is insolvent but based s decision upon "another potent fact" that the to obligations, the bank account of the taxpayer and ls debt to the bank, "arose out of the same transactin and the one is the consideration for the other". Petitioner believes that the *Bank of Shelby* case, wh h allowed the set-off even though the loan was mde after the tax lien arose, should be the basis for allo- ing the set-off in the present case.

Wherefore, upon the foregoing grounds it is e- spectfully urged that this Petition for Rehearing be granted, that argument thereon be heard by this Ho- orable Court *en banc* because of the extreme and wie- spread importance to all commercial banking and ll banks doing business in the United States, and furt er due to the fact that the ultimate opinion in this ese will have an extreme effect upon the practice of ll

nks with respect to any and all future unsecured ans, and that the judgment of the District Court be, on further consideration, reversed.

Dated, Las Vegas, Nevada,
January 22, 1958.

MILTON W. KEEFER,
B. MAHLON BROWN,
Attorneys for Appellant and Petitioner Bank of Nevada.

Certificate of Counsel.

We, Milton W. Keefer and B. Mahlon Brown, attorneys for Appellant, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for purpose of delay.

Dated, Las Vegas, Nevada,
January 22, 1958.

Milton W. Keefer,
B. Mahlon Brown.